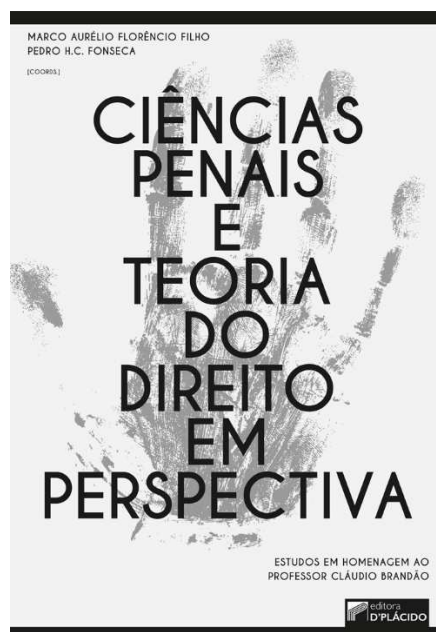


Georges MARTYN

“The Court System in the Low Countries (1800-2000)”

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[p. 113] CAPÍTULO 6: The Court System in the Low Countries (1800-2000)

Georges Martyn¹

1. Introduction

When travelling through the Americas, and certainly when visiting Brazil, I am always surprised by the scale of the countries. Huge territories are administered with public law principles and institutions directly or indirectly transplanted from the old European continent. As far as justice administration is concerned, enormous countries like Brazil or the United States, manage to keep order using singular supreme courts. What a difference with a Lilliput state like my home nation Belgium, where for less than ten million inhabitants we have six parliaments and six governments, and a multitude of historically evolved judicial institutions. In the Middle Ages and Early Modern Era, the territories that form present day Belgium, the Netherlands and Luxemburg were a conglomerate of principalities, gradually unified, first by the Burgundian Dukes, later by the Habsburg dynasty. In the age of the French Revolution,

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however, all old institutions were erased by the French occupier and substituted by French law. Although, in the nineteenth century, three national States emerged from the post-Waterloo battle zone, the three of them still have very similar characteristics and share a common legal culture. No wonder, the three were part and parcel of the original six founding states of what has become the European Union. In this text I try to give an overview of the supreme courts of these three countries. It [p. 114] is an adapted version of an earlier publication,² with which I want to contribute to the book in honour of professor Cláudio Brandão, an excellent scholar and a good friend. I hope he may enjoy reading these introductory lines to the judicial institutions and culture of some small European countries, where I hope to be able to host him in the years to come.

The court systems of Belgium, the Netherlands and Luxembourg, two kingdoms and a grand duchy, can in many senses be considered children of a common mother, the French judicial organisation. In the 19th and 20th centuries, each of these countries built up a national law, with a proper judicial organisation, topped by national supreme courts. Even today, the three of them have many common features, being rooted in *ius commune* and French foundations. Moreover, while each of these systems went its own way between the middle of the 19th and the middle of the 20th centuries, in the post-war era European and international influences brought the three sisters closer together again.

The composite state of the Netherlands, as it existed in the 15th and 16th centuries, first encountered the idea of a central court with the introduction, in 1473, of the *Parlement de Malines*, followed in 1504 by the Great Council in the same town. As in the case of the *Parlement de Paris*, learned lawyers, of both canon and civil law, played a paramount role in this institution. During the Insurrection, or Dutch Revolt, a twin brother of the Great Council, called Hoge Raad (High Council) was established on behalf of the Republic in The Hague in 1582. At the end of the 18th century, both of these central tribunals and the lower customary and princely institutions in the Northern and Southern Netherlands were completely washed away by the French ‘revolutionary’ system. In 1795 this was imposed by the French themselves in the southern provinces, ‘Belgium’ being, as ‘*les Neuf Départements Réunis*’, an integral part of France. In the [p. 115] northern provinces a *Nationaal Gerechtshof*, the supreme court of the Batavian Republic, a French satellite state, was created in 1802, but dissolved again in 1810, when these provinces were annexed to the French empire. So, from 1811 onwards, in the territories of what today is Belgium, the Netherlands and Luxembourg, the French judicial system was in force, from the lowest level of the justices of the peace to the highest court in Paris, the *Cour de cassation*, the latter deciding only questions of law after an appeal for annulment. The highest courts deciding the facts, in the territories of what once had been the Low Countries and the Prince-Bishopric of Liège, were the (French) imperial courts of justice in The Hague (North), Brussels (South) and Liège (Lower Rhine).

When, in 1815, Napoleon was defeated, the Congress of Vienna created a new state, the United Kingdom of the Netherlands, bringing together again the northern and the southern

² Georges Martyn, “Chapter 20. Belgium, the Netherlands and Luxembourg since 1800”, in Alain Wijffels & C.H. (Remco) Van Rhee (eds.), *European Supreme Courts: A Portrait through History*, London, Third Millennium Publishing, 2013, 218-227 (ISBN 978 1 906507 40 4); a Dutch version was published as: “Hoofdstuk 20. België, Nederland en Luxemburg sinds 1800”, in A.A. WIJFFELS & C.H. VAN RHEE (eds.), *Hoogste Gerechtshoven in Europa. Een historisch portret*, Antwerpen/Apeldoorn, Maklu-Uitgevers, 2013, 218-227 (ISBN 978 90 466 0563 9). Both versions have several illustrations.

provinces under a single sovereign, William of Orange Nassau. In the constitution of the newborn country it was stated that new national codes, including a judicial code, would be brought into being. In the meantime, the French judicial system continued to operate under William's rule. The Paris cassation court was substituted by making some kind of circular cassation appeal possible to the *Hooggerechtshof* in The Hague, and the courts of appeal in Brussels and Liège. In civil matters, the justice of the peace, having a principal mission of conciliating the parties, decided smaller claims. His territory of competence was a canton. Above these, the tribunal de première instance in each arrondissement (district), decided more important matters, with a possibility of appeal to the aforementioned courts. In criminal cases, the justice of the peace, as *tribunal de police*, decided smaller misdemeanours (contraventions) at the canton level; each arrondissement had a correctional law court sentencing *délits*. Felonies (*crimes*) were judged by jury in the *cours d'assises*. One important change introduced by William was the abolition of this jury trial. Furthermore, William, as an enlightened ruler, kept a firm grip on the judges he appointed. All judgments were pronounced in his name.

After Belgium's independence in 1830, in the (northern) Netherlands, the French judicial organisation was substituted, in 1838, by a Dutch national one, actually only a variation on the old theme. Trial by jury was not reintroduced. And as conciliation was no longer considered to be the main mission of the lowest civil judges, these [p. 116] were now called kantonrechters. At the second level the district courts of the (19) arrondissementen were maintained. Above, five courts of appeal were established (The Hague, Amsterdam, Arnhem, 's-Hertogenbosch and Leeuwarden), and a new supreme court, reviving an old name: the *Hoge Raad*, this is 'high council', sitting in The Hague, is, to this day, the cassation court in civil, criminal and fiscal matters for the Netherlands, as well as for the former Dutch Antilles and Aruba. The aim of cassation, following the French example, is to promote legal uniformity. The court, on appeal by one of the parties, examines whether a lower court observed proper application of the law in reaching its decision. The facts of the case, as established by the trial court, are no longer subject to discussion. An attorney general's office is attached to the supreme court. Its members' main task is to provide the court with independent advice on how to construe and apply the law in the case at hand. In administrative matters, however, other superior courts are competent, depending on the type of case: for example, the Administrative Jurisdiction Division of the Council of State, the Central Appeals Tribunal or the Trade and Industry Appeals Tribunal, also known as the Administrative High Court for Trade and Industry. The Council of State actually has two different functions: on the one hand, since its establishment in the 19th century it has advised Government and Parliament on legislation and governance; on the other hand, but only since 1976, its administrative division is the country's highest administrative court.

The development of the Belgian and Luxembourg legal systems continued to be enormously influenced by the French predecessor, in such a sense that some scholars even wonder if, at least for the 19th century, one might speak of an autonomous 'Belgian' (*mutatis mutandis* 'Luxembourg') legal tradition. The rather short period of French occupation (1795-1815) has indeed been decisive for these countries' legal history. In contrast to Dutch practice, Belgium's 1831 constitution explicitly reintroduced trial by jury for felonies, as well as for political and press crimes at the *Cours d'assises* (in Dutch, Belgium's second official

language, *Hof van Assisen*). These are organised per province (the old French *départements*) and are the highest criminal trial courts. (Throughout the 20th century, and most of all in the 21st, however, its competence has been hollowed out.) No ordinary appeal is possible, but only final appeal (cassation appeal) to the Court of Cassation. The Belgian Court of Cassation (*Cour* [p. 117] *de cassation*, originally in Dutch ‘*Hof van Verbreking*’, today ‘*Hof van Cassatie*’) was established in Brussels in 1832, together with a third court of appeal in Ghent, added to those in Brussels and Liège. In 1970, in execution of the 1967 Judicial Code, two extra appellate courts were created, with seats in Antwerp and Mons. The creation of a national court of cassation, following the French example, was an explicit provision of the Belgian constitution. Its first president, Baron de Gerlache, had been a practising lawyer at the Paris cassation court before 1815; he was president of the Belgian National Congress in 1830, as well as the first president of the Chamber of Representatives, before which Belgium’s first King, Leopold, swore the constitutional oath. Although the supreme court normally does not decide on the facts, until late in the 20th century it was also competent to judge criminal acts of ministers.

In Luxembourg, territorially speaking only a small grand duchy, the judicial hierarchy is headed by the *Cour supérieure de justice*, which comprises both a cassation court and an appellate court, the only one in the Grand Duchy.

2. Palaces of justice, with seated and standing magistrates

The fact that Baron de Gerlache was both practising jurist and politician was typical for the young Belgian state. Lawyers played important roles in the Belgian revolution and the establishment of the new institutions. In the first decades, many politicians became magistrates and, conversely, lawyers, and especially judges, formed an important group of members of Parliament – something unthinkable today in a democracy under the rule of law, where lawgiving and the judiciary are separated. In the Belgian constitutional debates, however, Montesquieu and the theory of the separation of powers had been cited frequently. Public proceedings in court and public judgments, lifetime nomination of judges and the irremovability of this function were some of the main explicit constitutional guarantees for an independent and impartial judiciary.

What this third power had to look like was not subject to much debate. Courtroom interiors and professional robes, just like judicial culture in general, continued ‘French style’. The Belgian government invested many francs in new ‘palaces of justice’, many of them in the typical 19th-century neo-gothic style, or in exuberantly eclectic varia-[p. 118]tions. The most famous example is the enormous Brussels courthouse on top of the old gallows hill (built 1866-83: twenty labourers died during its construction). It is an overwhelming architectural monument by Joseph Poelaert. Working-class people from the neighbourhood hated the man, and called him the ‘Skieven Architect’, meaning something like ‘the crooked architect’. He drove many inhabitants out of their houses to make room for the construction of what is now one of the most important monuments in the Belgian capital.

In Belgium, judges are considered to be independent and impartial, thanks to the aforementioned constitutional guarantees. However, for a very long time, at least in the

nomination procedure, party politics played an important role. The Minister of Justice was free to choose among the candidates. The classic Belgian parties – Catholics, Liberals and Socialists – made agreements on the equal partition of the available seats. The picture was largely duopolistic in the first years of the Belgian supreme court's existence, when Catholic magistrates occupied the seats, and the public ministry's offices were in liberal hands. This kind of political influence, independent of any control of the qualities of a candidate, was one of the main reasons for the crisis of the judiciary in the late 1990s. The case of Marc Dutroux, a paedophile serial killer, was the trigger that started a tsunami of changes in Belgium's police and judiciary systems. Hundreds of thousands of people drew together for a protest demonstration, called the White March. It was a spontaneous popular reaction to a Court of Cassation decision, known as the 'Spaghetti case'. A popular investigation judge – in the eyes of the public the hero who had sent Belgium's biggest criminal to jail – was taken off the Dutroux case because he had shown up for a benefit night organised by friends and family of the murdered children. People could not understand that this was such an expression of partiality that the man could no longer handle the case. The shy reaction of the Court of Cassation's proctor-general Liekendael, hiding herself behind a big book and her handbag, became an iconic image of the ivory tower in which the 20th-century Belgian judiciary had taken refuge from society. In response to the public animosity, and after a parliamentary investigation commission had revealed several dysfunctions of the Belgian system, a High Council of Justice was created to give advice on justice policy on the one hand, and on the other to select the best of the candidates for judicial appointments. [p. 119] The police were reorganised too, and victims were given better rights in criminal procedures, but, strangely enough, changes to the judicial system itself remained few and far between.

At the head of the Court of Cassation's public ministry is the proctor-general. As the representative organ of public order, the public ministry has several tasks. In criminal matters it investigates the facts, brings the suspect to court and is responsible for the enforcement of the sentence. In civil matters, it gives advice, for example on the interests of minors in family matters. In the supreme court, however, this public ministry is the *amicus curiae*, the 'friend of the court'. After the debates of the parties, it gives independent advice on how to decide the case, especially on how to interpret the law. Members of the public ministry, proctor-general, advocate-general and their deputies are all magistrates and belong to the judicial order. Opposed to the judges, who are seated while hearing cases – this is why they are called 'seated magistrates' – members of the public ministry stand when speaking; this is why they are called 'standing magistrates'. All magistrates, standing as well as seated, wear black robes in court, but, in the higher courts, red ones on official occasions. Since 1997, both the standing magistrates and the judges are assisted by 'referendaries', skilled lawyers who study the cases and help motivate the decisions.

3. Advocates

As well as magistrates, '*advocaten/avocats*' play a very important role in the theatre of justice. One uses the term 'advocates', although this translation is not really correct in English idiom. Actually, Belgian, Dutch or Luxembourg advocates are both 'barristers' and

‘solicitors’. Advocates give legal advice, both in judicial and administrative procedures, as well as in other legal matters of all kinds. Today, the Low Countries’ advocates can also represent their clients in court. Until late in the 20th century, however, this procedural representation was the proctor’s job. This double role of advocates and proctors was the heritage of the *ancien régime*’s Romano-canonical procedure. Although both functions had been abolished by the French revolutionaries, they were re-established in Napoleonic times. In the Netherlands the old name of *procureurs* was used again (since 1879, however, advocates are allowed to do all proctorial work), but in bilingual Belgium the party representatives were labelled *avoués* (French) or *pleitbezorgers* (Dutch).

[p. 120] The advocates were, and still are, organised in orders according to the basic 1810 Napoleonic decree. Although there were ‘*avocats à la cour d’appel*’, having the right to plead in the whole of the appellate court’s district, and other advocates at the *arrondissement* level, having the right to plead only in their own *département*, by early in the 19th century all advocates were allowed to act in all courts, except in the supreme court, as will be explained further. Advocates are independent professionals. To become a member of the (district) bar, one has to obtain a law degree from university, swear an oath and do a practical apprenticeship of three years in the office of a senior advocate. According to the 1810 decree, a council, called *conseil de discipline*, was established in every city with more than 20 advocates. If the district did not count that many advocates, the court itself exercised the disciplinary power. The disciplinary competence and the independence of the bar, based on the Napoleonic decree, were indeed very limited. The proctor-general played a controlling role and the Minister of Justice could forbid an advocate to practise. This strong hand of the executive was a welcome instrument of power for William, King of the United Kingdom of the Netherlands between 1815 and 1830. When French-speaking ‘Belgian’ advocates, for instance, protested against the King’s and his ministers’ policy, especially in language matters – it was the King’s wish to introduce Dutch as the unique official and judicial tongue in all provinces – some of them were put in jail, while others’ competence to plead was suspended. The advocates fought for, and won, independence almost immediately after the 1830 Belgian revolt. In 1832, the Brussels bar gathered in a general assembly of all advocates, without permission of the proctor-general and even against his explicit protest. They unanimously decided to compose a disciplinary council and to elect a *bâtonnier* (Dutch: *stafhouder*) as *primus inter pares*, i.e. the president of the council and the head of the bar.

The Belgian Parliament and government, composed as they were of many advocates and civil servants with law degrees, approved the proposal and adapted the Napoleonic legislation accordingly. From that moment on, the bar – actually the different district bars but most of all the Brussels one – developed as an important and independent player in the judicial and legal fields. The bar councils made many disciplinary rules and decided their cases at the district level. In the 20th century, however, due to growing mobility, the need [p. 121] was felt to establish a bar at the national level. The National Bar of the Netherlands was created in 1952. In Belgium, a national bar was established by the 1967 judicial code, but it has never functioned well. There were renewed language tensions between the Flemish and the French-speaking bars with the result that, around the start of the third millennium, the Belgian ‘National Bar’ was replaced by two regional bodies, the *Orde van Vlaamse Balies* and the *Ordre des Barreaux Francophones et Germanophone de Belgique*. These new

institutions seem to work better. In 2006, for instance, the disciplinary system was modernised. Cases are no longer decided at the ‘familiar’ district level, but by a more independent disciplinary council of senior advocates at the appellate court level, and plaintiffs can intervene more actively during the disciplinary procedure. Apart from these two regional orders, and the 28 local orders in the 27 districts (the Brussels bar split up into a French-speaking and a Dutch-speaking one in the 1980s), there is a special order of advocates at the bar of the Court of Cassation. The supreme court is, except in criminal and tax matters, not open to all advocates. All advocates can take courses, sit the exam and apply for the job, but only a legally limited number is allowed. Advocates at the cassation bar are nominated by royal decree. In fact, more than just advocates, they are rather public officers, who, like the old proctors, represent their clients.

In the Netherlands there is no comparable exclusive cassation bar. In the event, however, lawyers specialised in the complicated High Council procedures have started up associations in order to improve the cassation skills of their members. The Luxembourg cassation court has no particular bar either. The Grand Duchy has two independent bars, one in Diekirch, and of course the one in the capital, dating back to 1810.

4. Diverging legal and judicial cultures

Ever since 1830, the language issue, already touched upon, has always been a ‘Belgian’ problem. While in the Netherlands Dutch was the universal language, Belgium switched back to French as the official tongue, even though a majority of the inhabitants were Flemish, i.e. Dutch-speaking. French was spoken by the cultural elite, by magistrates and advocates. In criminal matters, Flemish suspects did not get the right to defend themselves in their own language until 1873, while official Dutch translations of legislation started only in 1898; in civil [p. 121] matters it was not before 1935 that law courts in Flanders were obliged to use Dutch. As the region of Belgium’s capital is bilingual, there, today, every court has both Dutch-speaking and French-speaking chambers. This makes it more and more probable that, in the future, some new state reform, might make ‘Justice’ a competence of the communities and thus reflect the dominant language of each locality. Until then, it continues to be a federal matter. This is why, according to many scholars, Belgium is not really a federal state, as it claims to be in the first article of its constitution. There are indeed legislative and executive powers at both the federal and the regional levels, but judicial power is exclusively federal. However, a first crack appeared in this federal judiciary when Flanders created, early 21st century, a new administrative court to handle judicial appeals to decisions in matters of building and other permits (*Raad voor Vergunningsbetwistingen*, recently brought together with two other newly created tribunals under the ‘Service for administrative tribunals’).

As the different language groups continue to grow apart, a similar divergence is taking place within the legal cultures. Since the 1930s Flemish students can get a university degree in their native language, and judicial proceedings in Flanders are in Dutch, while more and more Dutch-language legal periodicals and books are published. Every new generation of lawyers is more and more convinced that one can be a good Flemish lawyer without looking at what his French speaking colleagues write and decide. In oral pleadings, French speaking

advocates are much closer to French, Spanish or Italian orators, not afraid of using an emotional style in court. In Flanders, oral pleadings are 'cooler'. Especially in civil and commercial matters, Flemish advocates and magistrates actually prefer to depose written arguments, without any oral comment. In recent years, many young jurists have studied abroad, which leads, together with European integration, to a growing influence of 'foreign' law, apparently more in Flanders than in Wallonia. The Dutch-speaking chambers of the Council of State, for instance, have been influenced by the case law of its Dutch twin institution and by Dutch jurisprudence. Quite often, decisions by Dutch-speaking chambers of the Brussels council are criticised by members of the other linguistic group. In this kind of problem the supreme court should clear things up. The Court of Cassation comprises three chambers, each having a Dutch and a French division. Each division has five judges, called 'councillors' (*conseillers, raadsheren*). [p. 123] This means that the Belgian language border also runs through the country's supreme court. In fact, it often happens that a legislative text is construed differently by the two divisions. In such a case, the court can deliberate with 'united chambers' to restore uniformity. These same united chambers rule on conflicts of attribution. This means that, when it is unclear whether a case should be heard before administrative courts or judiciary courts, the supreme court decides which court has jurisdiction. Occasionally the Court of Cassation requests the opinion of the Court of Justice of the European Union with respect to the laws of the European Union, or of the Constitutional Court, with respect to issues of the constitutionality of laws. At least in these matters, the Court of Cassation is not really 'supreme' anymore.

This brings one to the problem of the often diverging views of the different 'highest courts' in Belgium. Today, as in the 19th century, the Court of Cassation still stands atop the hierarchy of judicial institutions. In contrast to a century ago, however, it no longer stands alone. The language problem and the piecemeal state reforms have played an important role in Belgium's general and political history, but also in the evolution of its judicial institutions. The reforming of the state since the 1970s is exactly the reason why Belgium, in contrast to the Netherlands, has a constitutional court (Dutch: *Grondwettelijk Hof*, French: *Cour constitutionnelle*, German: *Verfassungsgerichtshof*) with its seat near the Brussels royal palace. When autonomy was given to the (economic) regions (Flemish, Walloon and Brussels Capital Region) and to the (cultural) communities (Flemish, French and German-speaking), an arbitration court was established. It had to decide conflicts of competence between the different legislatures. The sensitive political side of this particular court was mirrored in its name, 'Arbitration Court' (*Arbitragehof, Cour d'Arbitrage, Schiedshof*), as well as in its composition, the bench of twelve judges comprising six Flemish and six French speaking members, six specialists of constitutional law and six former politicians. When, in the 1980s, educational matters were transferred to the communities, many politicians were afraid that this would lead to 'unequal' consequences, the faith-neutral state school system being the most successful one in Wallonia, the Catholic school system playing by far the most important role in Flanders. This is why the Arbitration Court was given the competence to annul any legislative rule violating, on the one hand, the constitutional [p. 124] freedom of education, but, on the other hand, also the equality and non-discrimination principles of the Constitution. In a praetorian way – that is, using its own powers – the court managed to combine these principles with all other constitutional fundamental rights. It declared void any

legislative rule not guaranteeing a fundamental right in an 'equal' measure to all citizens. What the Arbitration Court did was nothing less than to introduce judicial review by the back door, without Parliament ever having debated seriously on the subject. The lawgiver finally just followed what the court itself had realised: today, all fundamental rights can be determined and, since 2007, the court has the more transparent name of 'Constitutional Court'.

This means that Belgium actually has two supreme courts. On the one hand, there is the Constitutional Court, deciding conflicts of legislative competence and declaring legal rules void when in breach of constitutionally guaranteed fundamental rights. On the other hand, there is the old Court of Cassation, as established in 1832. When confronted with the fact that a legislative rule is against the constitution, the cassation court has never dared to declare the law inapplicable. In the 19th century this refusal to criticise the legislature was a typical expression of the influence of the Exegetical School. When construing the rule, it was not done to move away from the strict sense of the original text. This is also why it was only from the middle of the 20th century that the cassation court accepted the existence of general principles of law not literally expressed in legislative acts. The former strict attitude towards written rules was an expression of the way the separation of powers was understood. It was not the (supreme) judiciary's task to criticise Parliament, '*il n'appartient pas au pouvoir judiciaire de rechercher si la loi est ou non en harmonie avec la constitution*' (Court of Cassation, 23 July 1849). If the lawgiver itself neglected the constitution, this democratic decision was to be respected. Because of this same attitude, the Netherlands still do not have a constitutional court.

In Luxembourg a constitutional court was established at the end of the 20th century. It decides preliminary questions and its bench is a composition of judges from the other 'supreme courts': the president of the *Cour supérieure de justice*, the president of the *Cour administrative*, two councillors of the Court of Cassation and five more magistrates appointed by the Grand Duke.

[p. 125] If, with respect to legislative rules, judicial review has been accepted only recently in two of the three Low Countries, it has long been admitted with respect to administrative rules. Originally, in the 19th century, all courts were allowed to apply the 'exception of legality'. This meant that a judge could decide not to apply an administrative rule in the case at hand, when he thought this rule was against the constitution or against a legislative act. Here again, this competence was interpreted very strictly by the courts, as if judges were afraid of criticising the administration's acts. It was, for example, only in the 1920s that the administration's liability for tort was established by the Belgian Court of Cassation. The more radical possibility of giving a judicial institution the power to declare an administrative act void was only established after World War II, with the creation of the Council of State, actually another highest, be it administrative, court, very similar to its Dutch equivalent. If (the Administrative Jurisdiction Section of) the Council of State is the highest administrative court as far as legal control is concerned, it still stands under the Court of Cassation (and the same could be said of the Military Court, which was abolished in 2003).

This supreme court itself, however, can no longer be considered 'sovereign'. Belgium, for instance, has been condemned many times by the European Court of Human Rights, which means that a Court of Cassation decision was considered wrong (as appeal to the

Strasbourg court is only possible after having exhausted all national judicial degrees). The same is true for the highest courts of the Netherlands and Luxembourg. The three States also are regularly condemned by the Luxembourg based European Court of Justice, the court of the European Union.

In sum, what the 'highest court' of the Low Countries is, is a multifaceted question. A very particular 'highest court' is the one common to only Belgium, the Netherlands and Luxembourg.

5. The Benelux Court of Justice

Immediately after World War II, the three Low Countries started different initiatives of economic cooperation and a customs union, all together codified in the 1958 Benelux Treaty. The most important purpose of the Benelux Economic Union is the free movement of goods, persons, services and capital, but the Committee of Ministers, the Benelux Parliament (originally called Interparliamentary Consultative Council) and the Secretariat General also developed initiatives in areas such as intellectual property, environmental conservation, traffic insurance, forced execution of judicial decisions, et al.

The Benelux Union can in many senses be seen as a kind of laboratory for European integration. The Union's institutions do not stand 'above' the national ones. One can see this particularly in the so-called 'uniform laws'. These are rules adopted by the different national lawgivers, but composed as literal copies of a Benelux draft. To guarantee that a uniform law – a Belgian rule in Belgium, a Dutch rule in the Netherlands, a Luxembourg rule in the Grand Duchy – is also interpreted the same way in the different national systems, the Benelux Court of Justice was established. The court, sitting in Brussels, answers preliminary questions. National courts having to apply a Benelux uniform rule, and having doubts on the right interpretation in the circumstances at hand, can send their question to the court. In this way the final decision on the facts is national, but the interpretation of the Benelux rule applied is uniform.

The Benelux Union is an intergovernmental cooperation and policy is decided unanimously. Just as the Committee of Ministers is composed of national ministers and the Benelux Parliament of national members of Parliament, the Benelux Court of Justice is composed of three national justices, members of the supreme courts of each country. It was established by a 1965 treaty and started working in 1975. The court promotes uniformity in the application of the uniform legislation, but also has jurisdiction in some internal administrative cases. The preliminary jurisdiction is copied from the Court of Justice of the European Union, but its scope is wider, since it is not limited to purely economic law questions, but also extends to civil, commercial and criminal matters.

The arrival of the Benelux, Council of Europe and European Union courts of justice has opened the eyes of the national judiciaries in the Low Countries. After having been closed in on themselves for more than a century, the 'national' systems, in the post-war era, are more open to international and foreign influences. In 1971, for example, Belgium's Court of Cassation explicitly accepted the preponderance of European legislation over Belgian legislation. Comparative, international and European law have become important fields in the

lawyer's education; in the big cities of the Low Countries, international law firms have opened a local or 'European' office. Even the [p. 127] magistrates have become members of international organisations of magistrates. Magistrates seem to have left their ivory tower – those of lower courts much more than the justices of the higher courts, perhaps unfortunately.

It is true that, throughout history, the third power has guarded its independence with spirit – a brave aspect of this independence was displayed during the world wars, when the Belgian judiciary, and especially the Court of Cassation, refused to apply the German rules, 'la force ne créant pas le droit', which led to a judicial 'strike' – but for too long this independence meant a lack of openness. For more than one-and-a-half centuries the judiciary only spoke to the public at large on the occasion of the public ministry's *mercuriales*, solemn addresses at the opening of each judicial year. Magistrates were recruited from the top layer of society and, in their decisions, mostly manifested a hard-line conservatism.

The recent change in mentality is accompanied by social changes such as the increasing number of female judges, in Belgium legally impossible before a 1948 law (and even in 1961 only one per cent of the magistrates were women), or 'democratisation', making it possible for men and women from all social backgrounds to become a judge. It took quite some time, but at the end of the 20th century the judiciary became conscious of its social role and took initiatives to cope with the challenges of the third millennium. In the Netherlands earlier than in Belgium or Luxembourg, information and communication technology was introduced to render justice more efficiently. Judges came to the realisation that purely legal motivation is very often not enough to make a decision socially accepted. Press magistrates do their best to 'explain' what courts do.

Conversely, public opinion and journalists today are, much more than a century ago, interested in, and critical of, the judiciary's activities. Some magistrates have become well-known public figures. This openness of magistrates and justice is mirrored in the architecture of new law court buildings, with huge surfaces of glass, trying to symbolise the transparency of justice.